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Supreme Court of the United States

October Term, [illegible] 1958

No. 1591

SHERRILL O. and DORIS M. WOODALL,
husband and wife,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

No.....

GLENN S. and MARGARET H. MILLS,
husband and wife,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE TENTH CIRCUIT

JOHN B. TITTMANN,
Counsel for Petitioners,
First National Bank Bldg.,
Albuquerque, New Mexico.

JOHN P. DWYER,
VIRGIL L. BROWN,
615 First National Bank Bldg.,
Albuquerque, New Mexico,
Of Counsel.

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Supreme Court of the United States

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE TENTH CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioners, SHERRILL O. and DORIS M. WOODALL and GLENN S. and MARGARET H. MILLS, by their attorneys, respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Court to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in these causes on May 6, 1958.

OPINIONS BELOW

There was no opinion in the District Court for the District of New Mexico. The opinion of the Court of Appeals for the Tenth Circuit has not yet been officially reported but appears in the certified copy of the record at Pages 3 to 9*, and a printed copy thereof is appended to this Petition (Unofficially reported 1958 CCH ¶9547 and 1958 P-H ¶58-726).

STATEMENT OF JURISDICTION

The judgments of the Court of Appeals for the Tenth Circuit sought to be reviewed were dated May 6, 1958, and entered on the same date (R 10-11).

On May 26, 1958, an Order was issued staying issuance of the mandate for thirty days from June 10, 1958, pending Petition for Certiorari (R 11).

The jurisdiction of this Court is invoked under 28 USC Section 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the amount received by a newly hired employee from his new employer as reimbursement for actual travel and moving expenses incurred and paid by the employee in connection with reporting to the place of employment designated by the employer constitutes income within the meaning of Section 22, Internal Revenue Code 1939 (26 USC Sec. 22, 1939 IRC), or Section 61, Internal Revenue Code 1954 (26 USC Sec. 61, 1954 IRC).

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*Certified record on certiorari is hereinafter referred to and identified as "R". Certified copy of the record printed for use in the Court of Appeals is hereinafter referred to and identified as "PR".

2. Whether, if the reimbursement does constitute income, the newly hired employee may deduct against said reimbursement the amount of travel and moving expenses actually incurred by said employee as provided in Section 23, Internal Revenue Code 1939 (26 USC Sec. 23, 1939 IRC), or Section 161 et seq., Internal Revenue Code 1954 (26 USC Sec. 161 et seq., 1954 IRC).

STATEMENT OF THE CASE

The judgments of the Court of Appeals for the Tenth Circuit sought to be reviewed reversed the judgments of the District Court for the District of New Mexico (R 10-11).

Petitioners filed their Complaints for refund of taxes paid on the reimbursement for travel and moving expense on January 7, 1957 (PR 3-6). Respondent filed its Answers March 13, 1957 (PR 7-9). Orders consolidating the cases for trial were filed on April 1, 1957 (PR 9-10). After trial before the Court without a jury, Findings of Facts and Conclusions of Law were filed on June 20, 1957 (PR 10-16). Judgments for Petitioners were also filed on June 20, 1957 (PR 16-17). The Respondent took appeals from these judgments on July 29, 1957 (PR 17-18).

The Court of Appeals reversed the Orders of the District Court (R 10-11). The Court of Appeals held that the payments of travel and moving expenses are income within the meaning of the Internal Revenue Code and that the expenses incurred for such travel and moving are not expenditures for which deductions may be taken in computing income taxes.

Federal jurisdiction in the court of first instance was based on 28 USC Section 1346 (a)(1).

STATUTORY PROVISIONS INVOLVED

The following statutory provisions are involved and the pertinent parts are quoted herein:

INTERNAL REVENUE CODE OF 1939

Sec. 22. Gross Income.

"(a) GENERAL DEFINITION.—'Gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service***, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; * * *"

(26 USC Sec. 22, 1939 IRC)

Sec. 23. Deductions from Gross Income.

"In computing net income there shall be allowed as deductions:

"(a) EXPENSES.—

"(1) *Trade or business expenses.*—

"(A) *In General.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; * * *"

(26 USC Sec. 23, 1939 IRC)

INTERNAL REVENUE CODE OF 1954

Sec. 61. Gross Income Defined.

"(a) GENERAL DEFINITION.—Except as otherwise provided in this subtitle, gross income means all income

from whatever source derived, including (but not limited to) the following items:

"(1) Compensation for services, including fees, commissions, and similar items; * * *"

(26 USC Sec. 61, 1954 IRC)

Sec. 162. Trade or Business Expenses.

"(a) IN GENERAL.—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—

"(1) a reasonable allowance for salaries or other compensation for personal services actually rendered;

"(2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; * * *"

(26 USC Sec. 162, 1954 IRC)

REASONS FOR ALLOWANCE OF THE WRIT

1. The question presented is an important question of Federal law which has not been, but should be, settled by this court.

The practice of reimbursing newly hired employees for the expense of moving to the place of employment has become widespread in industry generally. The fact situations in the cases to which this Petition is directed are typical of literally thousands of cases throughout the United States. To be specific, Sandia Corporation, the employer of the Petitioners, during the years 1953 through 1955, reimbursed travel and moving expenses to 954 employees. The amount of the reimbursements was approximately $480,000.00. Ap-

plying an estimated tax rate of 25% to these reimbursements, the amount of tax involved to employees of Sandia Corporation alone during the three years 1953 to 1955 inclusive is approximately $118,000.00. All of the employees involved are relatively small taxpayers and are all salaried employees. The impact of the tax, based upon the decision of the Circuit Court of Appeals, is a heavy one consdering the incomes of the employees involved.

The situation which exists with Sandia Corporation should be multiplied many times in order to properly appreciate the impact of the Circuit Court opinion on taxpayers throughout the United States. There was testimony before the trial court that in the years 1953 and 1954 there were approximately 5,000 companies recruiting engineering personnel on the campuses of the universities of the United States (PR 32). It is not known exactly how many of these companies adopted the practice of reimbursing "new hires" for travel and moving expense to their new place of employment, but the number is substantial. It can, therefore, be conservatively estimated that the decision of the Circuit Court of Appeals will affect the income taxes of a minimum of 50,000 taxpayers throughout the United States. In a case where so many individual taxpayers are involved, where the amounts of tax are an important consideration to the wage-earning taxpayers, and where there is involved a practice so widespread throughout industry, only a decision of the Supreme Court of the United States would appear to be adequate to resolve this unsettled area of the Federal law. The specific question herein has not been passed upon by any other Circuit Court of the United States. As will be seen from the foregoing, however, taxpayers throughout the whole of the country will be affected by the ultimate outcome of these cases.

2. The decision of the Court below is believed to be erroneous.

The basis of the opinion of the Circuit Court of Appeals appears to be that the reimbursement paid to Petitioners constituted "compensation for services", and the Circuit Court decided that in the instant cases the reimbursement did constitute such compensation (R 7). This conclusion of the Circuit Court of Appeals flies in the face of undisputed testimony in the trial court that the amount of reimbursement bore no relation to the salary to be paid to a new employee and that the amount of reimbursement was based merely upon the distance traveled to the new place of employment, the size of the new employee's family, and the amount of household goods transported (PR 33). The Supreme Court of the United States, in the case of *Old Colony Trust Company v. Commissioner,* 279 U.S. 716 (1929), had before it the question of whether the payment of an employee's income taxes by his employer was additional compensation for services rendered and includible in the gross income of the employee. It held that the payment of the employee's income taxes did constitute additional compensation for services rendered and was therefore includible in the gross income of the employee. It is obvious from a reading of this case that it was the intention of both parties to the employment contract that this would constitute additional compensation. It is obvious from the facts in the case that, in agreeing to pay the employee's income taxes, the employer was taking into consideration the worth of the employee to the corporation, and it is obvious also that the payment of the employee's taxes was a gain derived by the employee from his labor.

In the case of *Levey* v. *Helvering,* 68 F. 2d 401 (1933), the United States Court of Appeals for the District of Columbia had a similar question before it. The language of

the Court, page 403 of the opinion, is significant where the Court states:

> "* * * In most of the cases in which the question has arisen, the answer has been made to depend on the intention of the parties, and this usually and properly has been said to turn on the attending facts and circumstances. Ordinarily to ascertain the intention with which a thing is done, one looks to the motive impelling it. Here the motive is obvious. * * *"

In *Schairer* v. *Commissioner*, 9 T.C. 549 (1947), the Tax Court also applied the test of the intention of the parties. In this case RCA requested an employee to move his home from New York to New Jersey in order to be closer to his place of employment in Princeton, New Jersey, and agreed to reimburse the employee for any loss that he might sustain in selling his home in New York. The amount of the reimbursement was $14,644.20. The Court approached the problem from the standpoint of whether under the evidence the payment by the employer was intended as additional compensation. Holding that it did not constitute additional compensation, it therefore decided that the reimbursement did not constitute gross income to the employee involved.

The Circuit Court in the instant cases in referring to the expenses incurred by the "new hires" had the following to say: "The expenditures had no relation to any service which was being performed for the employer." (R 8). If this statement is true, then it can be said with equal conviction that the reimbursement by Sandia Corporation had no relation to any service which was being performed for the employer. It would then follow from the cases cited above that the reimbursements did not constitute compensation for services.

CONCLUSION

It is respectfully submitted that the Petition should be granted, and the Writ issue.

JOHN B. TITTMANN,
Counsel for Petitioners,
First National Bank Bldg.,
Albuquerque, New Mexico.

JOHN P. DWYER,
VIRGIL L. BROWN,
615 First National Bank Bldg.,
Albuquerque, New Mexico,
Of Counsel.

APPENDIX A

United States Court of Appeals

Tenth Circuit

MARCH TERM—1958

UNITED STATES OF AMERICA,
Appellant.

vs.

SHERRILL O. and DORIS M. WOODALL, husband and wife,
Appellees.

No. 5753

Appeals from the United States District Court for the District of New Mexico.

UNITED STATES OF AMERICA,
Appellant.

vs.

GLENN S. and MARGARET H. MILLS, husband and wife,
Appellees.

No. 5754

Karl Schmeidler, Department of Justice, Washington, D.C., (John N. Stull, Acting Assistant Attorney General, Washington, D.C., Lee A. Jackson, Harry Baum, Department of Justice, Washington, D.C., and James A. Borland, United States Attorney, Albuquerque, New Mexico, were with him on the brief), for Appellant:

John P. Dwyer, Albuquerque, New Mexico, (Virgil L. Brown, Albuquerque, New Mexico, was with him on the brief), for Appellees.

Before PICKETT, LEWIS and BREITENSTEIN, *Circuit Judges.*

PICKETT, *Circuit Judge.*

These two cases, with independent factual backgrounds, but presenting identical legal questions, have been consolidated for disposition. They present two interrelated issues: (1) whether an amount received by an employee as reimbursement for the costs of relocating himself and his family at the place of his new employment is gross income for income tax purposes; and (2) whether such costs are deductible business expenses.

In April, 1954, while otherwise employed at Dallas, Texas, the plaintiff Woodall accepted employment with the Sandia Corporation which would be performed at Albuquerque, New Mexico. In the contract of employment Sandia agreed that Woodall would be reimbursed for certain expenses incurred in moving himself and his family from Dallas to Albuquerque. The reimbursement was conditioned upon Woodall's remaining in Sandia's employ for at least six months. Pursuant to this contract, after his arrival in Albuquerque, Woodall was paid the sum of $592.28.[1]

During the year 1953 the plaintiff Mills, while an engineering student at the University of Kentucky, accepted employment with the Sandia Corporation with the understanding that his relocation expenses would be paid in the same manner as those of Woodall. After arrival in Albuquerque he submitted a voucher for such expenses and was paid the sum of $446.67.

Neither of the plaintiffs reported these reimbursements as income in their tax returns. The Commissioner subsequently determined deficiencies against them, which they paid. Each filed a claim for refund and then brought an action to recover the amount of the deficiency. The trial court found in each case that the reimbursement of relocation expenses was one of the conditions of the offer and

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[1] Sandia Corporation was in need of professional engineers and other technically trained employees to work in Albuquerque, New Mexico. It conducted extensive recruiting programs in other areas and at various universities to take care of its needs. As an inducement for the acceptance of employment, the corporation offered to reimburse the newly hired employees for expenses which they incurred in moving to Albuquerque. This was in addition to the agreed salary. The allowance included the cost of moving 7,500 pounds of household goods, hotel and meals en route, and 6c per mile for automobile travel.

acceptance of employment; that Sandia Corporation did not intend that the reimbursement would constitute compensation; and that no gain or profit was realized by the plaintiffs by virtue of this reimbursement. The court concluded that the amounts reimbursed for actual travel and moving expenses incurred did not constitute income to the plaintiffs within the meaning of Section 22, Internal Revenue Code, 1939, or Section 61, Internal Revenue Code, 1954. Furthermore, the trial court held that these items were ordinary and necessary expenditures incurred during the taxable year in carrying on a trade or business, and deductible under the provisions of Section 23, Internal Revenue Code, 1939, or Section 161, et seq., Internal Revenue Code, 1954. We agree with the contention of the United States, that payments such as those received in these cases are income within the meaning of the Internal Revenue Code, and that the expenses incurred here are not expenditures for which deductions may be taken in computing income taxes.

With enumerated exceptions, Section 22(a) of the 1939 Code, and Section 61(a) of the 1954 Code, provide that all income derived from any source is gross income.[1] It has been repeatedly held that by the comprehensive statutory definition, Congress intended "to tax all gains except those specifically exempted"[2], and a liberal construction should be given to the broad statutory provisions in recognition of this intention. Commissioner v. Glenshaw Glass Co., 348 U.S. 426, 430; Commissioner v. Jacobson, 336 U.S. 28,49; Helvering v. Stockholms Enskilda Bank, 293 U.S. 84; United States v. Robertson, 10 Cir., 190 F.2d 680, affirmed 343 U.S. 711; Duran v. Commissioner, 10 Cir., 123 F.2d 324. The law is settled that the statutory definition of gross income "is

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[1] Section 22(a) defines "gross income" as including "gains, profits, and income derived from * * * compensation for personal service, of whatever kind and in whatever form paid * * * ". The definition of gross income was simplified in the 1954 Code, but there was no change intended in the all-inclusive effect of the statute. Commissioner v. Glenshaw Glass Co., 348 U.S. 426.

[2] In Commissioner v. Jacobson, 336 U.S. 28, 49, the court said: "The income taxed is described in sweeping terms and should be broadly construed in accordance with an obvious purpose to tax income comprehensively. The exemptions, on the other hand, are specifically stated and should be construed with restraint in the light of the same policy."

broad enough to include in taxable income any economic or financial benefit conferred on the employee as compensation, whatever the form or mode by which it is effected", Commissioner v. LoBue, 351 U.S. 243, 247; Commissioner v. Glenshaw Glass Co., supra; Commissioner v. Smith, 324 U.S. 177, 181, rehearing denied 324 U.S. 695; Choteau v. Burnet, 283 U.S. 691, 694.

One of the conditions which induced taxpayers to accept employment was that their moving expenses to the place where they would be employed would be paid by the employer. While it is true that there was no gain or profit from the payments to the taxpayers, it cannot be denied that they received an economic and beneficial gain. Had the expenses not been paid by the employer, the burden would necessarily have been on the taxpayers. The payment was in the nature of a cash bonus as an inducement to accept employment. As a matter of law, these payments are no different than had Sandia given the taxpayers cash to pay outstanding obligations, or for the payment of living expenses for a specified period after their arrival in Albuquerque. The form of payment, to constitute income, is immaterial. The statute explicitly declares that gross income shall include compensation for personal services of whatever kind and in whatever form it is paid. Commissioner v. Smith, supra; United States v. Joliet & C. R. Co., 315 U.S. 44, 49; Old Colony Trust Co. v. Commissioner, 279 U.S. 716. These payments come within the statutory description of gross income.

We think that it is equally well settled that the expenditures are not deductible expenses under Section 22(n) and Section 23(a) of the Internal Revenue Code of 1939, or Section 62(2) and Section 162 of the Internal Revenue Code of 1954. Both taxpayers testified that the reasons which motivated them to accept employment with Sandia Corporation were personal. The expenditures had no relation to any service which was being performed for the employer. It has been said that "The job, not the taxpayer's pattern of living, must require the travel" for the expenses therein incurred to be deductible under the statute. Commissioner v. Peuri

foy, 4 Cir., F.2d , (decided November 11, 1957; appeal pending); Carragan v. Commissioner, 2 Cir., 197 F.2d 246, 249. See also Commissioner v. Flowers, 326 U.S. 465; Barnhill v. Commissioner, 4 Cir., 148 F.2d 913, 159 A.L.R. 1210. Before one can deduct travel expense, it must be shown that the expense was reasonable and necessary, incurred while away from home, and in the pursuit of business. That is, the travel expense must have a direct connection with the carrying on of the trade or business of the taxpayer or his employer. It must be necessary or appropriate to the development and pursuit of the business or trade. Commissioner v. Flowers, supra. See also Hotel Kingkade v. Commissioner, 10 Cir., 180 F.2d 310; Knight-Campbell Music Co. v. Commissioner, 10 Cir., 155 F.2d 837; Hales-Mullaly, Inc., v. Commissioner, 10 Cir., 131 F.2d 509. Furthermore, the Treasury Department has distinguished between expenses incurred to obtain employment and those incurred in the course of employment. Treasury Regulation 118 §39.23(a)-15(f). See also McDonald v. Commissioner, 323 U.S. 57.

While it may appear to be equitable that expenses incurred in seeking and obtaining employment, or in traveling to the place of employment, should be treated as though they had been incurred in the performance of one's duty as an employee, it has, nevertheless, been long recognized that deductions are matters of legislative grace, allowable only when there is a clear provision for them, and do not turn upon equitable considerations. McDonald v. Commissioner, supra; Deputy v. duPont, 308 U.S. 488; New Colonial Ice Co. v. Helvering, 292 U.S. 435. What should be allowed as an expense deduction is a matter of policy for Congress, not the Courts.

REVERSED.

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 159

SHERRILL O. and [redacted]ORIS M. WOODALL, and GLENN S. and MARGARET H. MILLS, *Petitioners*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court wrote no opinion. Its findings of fact and conclusions of law (R. 10-16) are not officially reported. The opinion of the Court of Appeals (Pet. App. 1-5) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 6, 1958. The petition for a writ of certiorari was filed on July 8, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether an amount received by a newly hired employee in reimbursement of the costs of moving his home and family to the city of his new employment, paid by the employer pursuant to the terms of the employment contract, is includible in the employee's gross income under Section 22(a) of the Internal Revenue Code of 1939 or Section 61 of the Internal Revenue Code of 1954.

2. Whether the moving costs incurred by such new employee represent deductible business expenses under Section 23(a)(1) of the Internal Revenue Code of 1939 or Section 162 of the Internal Revenue Code of 1954, or whether such costs represent nondeductible personal expenses under Section 24(a)(1) of the Internal Revenue Code of 1939 or Section 262 of the Internal Revenue Code of 1954.

STATUTES AND REGULATIONS INVOLVED

Sections 22(a) and(n), 23(a)(1) and 24(a) of the Internal Revenue Code of 1939, Sections 61(a), 62, 162(a) and 262 of the Internal Revenue Code of 1954, and Sections 39.22(n)-1, 39.23(a)-2 and 39.23(a)-15 of Treasury Regulations 118, are set forth in the Appendix, *infra*, pp. 7-13.

STATEMENT

The relevant facts may be summarized as follows:

The Sandia Corporation was in need of professional engineers and other technically trained employees to work in Albuquerque, New Mexico. It conducted extensive recruiting programs in other areas and at various universities. As an inducement to accept employment, it offered to reimburse newly hired employees

for expenses which they incurred in moving to Albuquerque. This was in addition to the agreed salary. The allowance included the cost of moving 7,500 pounds of household goods, hotel and meals en route, and six cents a mile for automobile travel. (Pet. App. 2).

In April, 1954, while otherwise employed at Dallas, Texas, the taxpayer Woodall accepted employment with Sandia to be performed at Albuquerque. In the contract of employment Sandia agreed that Woodall would be reimbursed for certain expenses incurred in moving himself and his family from Dallas to Albuquerque. This reimbursement was conditioned upon Woodall's remaining in Sandia's employ for at least six months. Woodall moved to Albuquerque on June 13, 1954, incurring relocation expenses in the amount of $592.28, which Sandia paid to him shortly after his arrival. On June 14, 1954, he was placed on the company payroll. (Pet. App. 2; R. 20-21.)

During 1953 the taxpayer Mills, while an engineering student at the University of Kentucky, accepted employment with Sandia with the understanding that his relocation expenses would be paid in the same manner as those of Woodall. After his arrival in Albuquerque, Mills submitted a voucher for these expenses and was paid the sum of $446.67. (Pet. App. 2.)

Neither taxpayer reported the reimbursement as income in his income tax return. The Commissioner subsequently determined deficiencies against them, which they paid. Each taxpayer filed a claim for refund and then brought a refund action in the District Court. The District Court found in each case that the reimbursement was not includible in the taxpayer's gross income and that, even if it were, it was offset by

an equal amount deductible as an ordinary and necessary travel expense incurred in carrying on a trade or business. (Pet. App. 2-3.) The Court of Appeals reversed. (Pet. App. 3-5.)

ARGUMENT

1. Contrary to the taxpayers' assertion (Pet. 5-6), no important question requiring settlement by this Court is presented by the holding below that the reimbursement payments made by Sandia to the taxpayers are includible in their respective gross incomes under Section 22(a) of the 1939 Code (Appendix, *infra*, p. 7) and Section 61(a)(1) of the 1954 Code (Appendix, *infra*, p. 9).[1] That holding is in full accord with and applies decisions of this Court which have already settled the applicable principles. The Court has repeatedly stated that by the comprehensive statutory definition of gross income Congress intended "to tax all gains except those specifically exempted" (*Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426, 429-430) and that this definition "is broad enough to include in taxable income any economic or financial benefit conferred on the employee as compensation, whatever the form or mode by which it is effected" (*Commissioner* v. *Smith*, 324 U.S. 177, 181, rehearing denied, 324 U.S. 695). See also, *Commissioner* v. *LoBue*, 351 U.S. 243, 246; *Gen. Investors Co.* v. *Commissioner*, 348 U.S. 434, 436. The payments made by Sandia to the taxpayers clearly conferred on each taxpayer a financial benefit which, just as clearly, was not a gift and therefore not exempt from tax under one of the enumerated exclusions from gross income (Section 22(b)(3) of the

[1] The payment to Mills took place in 1953 and is governed by the 1939 Code, while the payment to Woodall took place in 1954 and is subject to the 1954 Code.

1939 Code (26 U.S.C. 22(b)(3)) and Section 102 of the 1954 Code (26 U.S.C. 1952 ed., Supp. V, 102)). The payments, having been made pursuant to a contract of employment (R. 20, 26) and thus in discharge of a legal obligation, constituted taxable income rather than gifts.[2] *Robertson* v. *United States,* 343 U.S. 711, 713-714; *Commissioner* v. *LoBue, supra; Old Colony Tr. Co.* v. *Commissioner,* 279 U.S. 716, 729-730; *Commissioner* v. *Jacobson,* 336 U.S. 28, 51; *Helvering* v. *Amer. Dental Co.,* 318 U.S. 322, 330.

2. The taxpayers do not discuss that portion of the decision below which holds (Pet. App. 4-5) that the expenses of moving to a new place of employment are personal expenses, and therefore nondeductible under Section 24(a) of the 1939 Code (Appendix, *infra,* p. 8) and Section 262 of the 1954 Code (Appendix, *infra,* p. 10), rather than expenses of carrying on a trade or business away from home, for which a deduction is authorized by Section 23(a)(1)(A) of the 1939 Code (Appendix, *infra,* p. 8) and Section 162(a)(2) of the 1954 Code (Appendix, *infra,* p. 10). It is of course apparent that the taxpayers' expenditures in moving to Albuquerque were not incurred in carrying on a trade or business, a statutory prerequisite to deductibility, and therefore cannot meet the requirement that they be incurred in the prosecution of their employer's business. See *Commissioner* v. *Flowers,* 326 U.S. 465, 473, 474; *Ney* v. *United States,* 171 F. 2d 449 (C.A. 8th), certiorari denied, 336 U.S. 967; *Carragan* v. *Commissioner,* 197 F. 2d 246, 249-250 (C.A. 2d); *York* v. *Commissioner,*

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[2] One of Sandia's representatives testified (R. 32-33) that Sandia treated these reimbursement payments as part of the cost of procuring and training personnel.

160 F. 2d 385 (C.A. D.C.); *Barnhill* v. *Commissioner*, 148 F. 2d 913, 917 (C.A. 4th). The expenses were incurred in preparing for or obtaining employment and accordingly were personal expenses. See *McDonald* v. *Commissioner*, 323 U.S. 57, 60; *York* v. *Commissioner, supra; Mays* v. *Bowers*, 201 F. 2d 401 (C.A. 4th), certiorari denied, 345 U.S. 969; Treasury Regulations 118, Section 39.23(a)-15(f) (Appendix, *infra*, pp. 12-13); Rev. Rul. 55-140, 1955-1 Cum. Bull. 317.

The taxpayers make no mention of *Commissioner* v. *Peurifoy*, 254 F. 2d 483 (C.A. 4th), in which the Court granted certiorari on May 19, 1958 (356 U.S. 956). In that case (No. 46, October Term, 1958) the issue is the deductibility under Section 23(a)(1)(A) of the 1939 Code of expenditures made by construction workers for meals and lodging during their employment at a job site where they did not reside. Decision in the case, as argued and decided by the lower courts, turned upon whether the taxpayers were away from home within the meaning of the deduction statute. The case, we submit, is clearly distinguishable on its facts.

CONCLUSION

The decision below is correct. There is no conflict of decisions and no important question is involved. The petition for a writ of certiorari should be denied.

Respectfully submitted,

J. Lee Rankin,
Solicitor General.
Charles K. Rice,
Assistant Attorney General.
Melva M. Graney,
Karl Schmeidler,
Attorneys.

August, 1958.

APPENDIX

Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; * * *

* * * * *

(n) [As added by Sec. 8(a) of the Individual Income Tax Act of 1944, c. 210, 58 STAT. 231] *Definition of "Adjusted Gross Income."*—As used in this chapter the term "adjusted gross income" means the gross income minus—

(1) *Trade and business deductions.*—The deductions allowed by section 23 which are attributable to a trade or business carried on by the taxpayer, if such trade or business does not consist of the performance of services by the taxpayer as an employee;

(2) *Expenses of travel and lodging in connection with employment.*—The deductions allowed by section 23 which consist of expenses of travel, meals, and lodging while away from home, paid or incurred by the taxpayer in connection with the performance by him of services as an employee;

(3) *Reimbursed expenses in connection with employment.*—The deductions allowed by section 23 (other than expenses of travel, meals, and lodging while away from home) which consist of expenses paid or incurred by the taxpayer, in connection with the performance by him of serv-

ices as an employee, under a reimbursement or other expense allowance arrangement with his employer;

* * * * *

(26 U.S.C. 22.)

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) [As amended by Sec. 121(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Expenses.*—

(1) *Trade or business expenses.*—

(A) *In General.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; * * *

* * * * *

(26 U.S.C. 23.)

SEC. 24. ITEMS NOT DEDUCTIBLE.

(a) *General Rule.*—In computing net income no deduction shall in any case be allowed in respect of—

(1) [As amended by Sec. 127(b) Revenue Act of 1942, *supra*]. Personal, living, or family expenses, except extraordinary medical expenses deductible under section 23(x);

* * * * *

(26 U.S.C. 24.)

Internal Revenue Code of 1954:

SEC. 61. GROSS INCOME DEFINED.

(a) *General Definition.*—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

(1) Compensation for services, including fees, commissions, and similar items;

* * * * *

(26 U.S.C. 1952 ed., Supp. V, 61(a).)

SEC. 62. ADJUSTED GROSS INCOME DEFINED.

For the purposes of this subtitle, the term "adjusted gross income" means, in the case of an individual, gross income minus the following deductions:

* * * * *

(2) *Trade and business deductions of employees.*—

(A) *Reimbursed Expenses.*—The deductions allowed by part VI (sec. 161 and following) which consist of expenses paid or incurred by the taxpayer, in connection with the performance by him of services as an employee, under a reimbursement or other expense allowance arrangement with his employer.

(B) *Expenses For Travel Away From Home.*—The deductions allowed by part VI (sec. 161 and following) which consist of expenses of travel, meals, and lodging while away from home, paid or incurred by the taxpayer in connection with the performance by him of services as an employee.

(C) *Transportation Expenses.*—The deductions allowed by part VI (sec. 161 and follow-

ing) which consist of expenses of transportation paid or incurred by the taxpayer in connection with the performance by him of services as an employee.

(D) *Outside Salesmen.*—The deductions allowed by part VI (sec. 161 and following) which are attributable to a trade or business carried on by the taxpayer, if such trade or business consists of the performance of services by the taxpayer as an employee and if such trade or business is to solicit, away from the employer's place of business, business for the employer.

* * * * *

(26 U.S.C. 1952 ed., Supp. V, 62.)

SEC. 162. TRADE OR BUSINESS EXPENSES.

(a) *In General.*—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business including—

(1) a reasonabl allowance for salaries or other compensation for personal services actually rendered;

(2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; * * *

* * * * *

(26 U.S.C. 1952 ed., Supp. V, 162(a).)

SEC. 262. PERSONAL, LIVING, AND FAMILY EXPENSES.

Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses.

(26 U.S.C. 1952 ed., Supp. V, 262.)

Treasury Regulations 118, promulgated under the Internal Revenue Code of 1939:

Sec. 39.22(n)-1. *Adjusted gross income.* (a) the term "adjusted gross income" means the gross income computed under section 22 minus such of the deductions allowable under section 23 as are specified in section 22(n). * * *

(b) Section 22(n) does not create any new deductions, but merely specifies which of the deductions provided in section 23 shall be allowed in computing adjusted gross income. The circumstance that a particular item is specified in one of the clauses under section 22(n) and is also embraced within the terms of another of such clauses does not permit the item to be twice deducted in computing adjusted gross income.

(c) The deductions specified in section 22(n) for the purpose of computing adjusted gross income are: (1) Deductions allowable under section 23, which are attributable to a trade or business carried on by the taxpayer not consisting of services performed as an employee; (2) deductions allowable by section 23 which constitute expenses of travel, meals, and lodging while away from home, paid of incurred by the taxpayer in connection with the performance by him of services as an employee; (3) deductions allowable by section 23 (other than expenses of travel, meals, and lodging while away from home) which consist of expenses paid or incurred in connection with the performance of services as an employee under a reimbursement or other expense-allowance arrangement with his employer; * * *

* * * * *

(e) Traveling expenses paid or incurred by an employee in connection with his employment while away from home which are deductible from gross

income in computing net income may be deducted from gross income in computing adjusted gross income. Among the items included in traveling expenses are charges for transportation of persons or baggage, expenditures for meals and lodging, and payments for the use of sample rooms for the display of goods. See § 39.23(a)-2.

(f) Expenses, other than traveling expenses, paid or incurred by an employee which are deductible from gross income in computing net income and for which he is reimbursed by the employer under an express agreement for reimbursement or pursuant to an expense allowance arrangement may also be deducted from gross income in computing adjusted gross income.

Sec. 39.23(a)-2. *Traveling expenses.* (a) Traveling expenses, as ordinarily understood, include railroad fares and meals and lodging. If the trip is undertaken for other than business purposes, the railroad fares are personal expenses and the meals and lodging are living expenses. If the trip is solely on business, the reasonable and necessary traveling expenses, including railroad fares, meals, and lodging, are business expenses.

(b) If, then, an individual, whose business requires him to travel, receives a salary as full compensation for his services, without reimbursement for traveling expenses, or is employed on a commission basis with no expense allowance, his traveling expenses, including the entire amount expended for meals and lodging, are deductible from gross income.

(c) If an individual receives a salary and is also paid his actual traveling expenses, he shall include in gross income the amount so repaid and may deduct such expenses.

(d) If an individual receives a salary and also an allowance for meals and lodging, as, for example, a per diem allowance in lieu of subsistence, the amount of the allowance should be included in gross income and the cost of such meals and lodging may be deducted therefrom.

* * * * *

(f) Only such expenses as are reasonable and necessary in the conduct of the business and directly attributable to it may be deducted.

* * * * *

(i) Commuters' fares are not considered as business expenses and are not deductible.

Sec. 39.23(a)-15. *Nontrade or nonbusiness expenses.* * * *

* * * * *

(f) Among expenditures not allowable under section 23(a)(2) are the following: Commuter's expenses; expenses of taking special courses or training; expenses for improving personal appearance; the cost of rental of a safe-deposit box for storing jewelry and other personal effects; and expenses such as expenses in seeking employment or in placing oneself in a position to begin rendering personal services for compensation, campaign expenses of a candidate for public office, bar examination fees and other expenses incurred in securing admission to the bar, and corresponding fees and expenses incurred by physicians, dentists, accountants, and other taxpayers for securing the right to practice their respective professions.

* * * * *

Sections 1.62-1(a), (b), (c), (e) and (f), 1.162-2, and 1.212-1(f) of Treasury Regulations on Income Tax under the Internal Revenue Code of 1954 contain comparable provisions.

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